May 4, 2010

Via ECF

Honorable Joel A. Pisano, U.S.D.J.
Clarkson S. Fisher Federal Building
and U.S. Courthouse
402 E. State Street
Trenton, NJ 08608

Re: ANJRPC, et al. v. Christopher J. Christie, Governor of New Jersey et al.
Docket No.: 3:10-cv-00271-JAP-TJB
Our File No.: 011901

LETTER MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CITY OF HACKENSACK'S MOTION TO DISMISS

Dear Judge Pisano:

Please accept this letter memorandum of law in lieu of a more formal brief in opposition to the Motion to Dismiss filed by Defendant City of Hackensack ("Hackensack") on April 16, 2010 and returnable on May 17, 2010.

PLAINTIFFS' MOTION FOR INJUNCTIVE RELIEF

Hackensack seeks an Order dismissing Plaintiffs' Amended Complaint as against Hackensack pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(h)(3); however, it also seeks to use its motion papers to file untimely opposition to Plaintiffs' motion for

injunctive relief. As set forth in the letter to the Court dated April 29, 2010, this opposition is grossly untimely, as Hackensack's opposition was due on March 22, 2010 and Plaintiffs' reply has already been filed and oral argument scheduled. The Court should not permit such a late filed opposition.

Nevertheless, should the Court determine to consider Hackensack's papers, Plaintiffs argue as follows.

A. Plaintiffs' Motion for Injunctive Relief Applies to Hackensack

Hackensack attempts to claim that Plaintiffs' Preliminary Injunction Motion should not be applied as against Hackensack because Plaintiffs never refiled and served it on Hackensack. This argument is without merit. First, Hackensack cites no authority for the proposition that a motion must be refiled in order to be applicable to a party added to the case by amendment. In fact, Plaintiffs did timely serve its motion papers along with the Amended Complaint and the Amended Proposed Form of Order which included Hackensack in the caption (see

Certification of Service, DDE#20). There is no merit to the proposition that Hackensack did not have notice of Plaintiffs' pending motion.

B. Hackensack Has Not Shown That it is Complying or Will Continue to Comply with N.J.A.C. 13:54-1.4(h) once Plaintiffs' Complaint is Dismissed and has Therefore Failed to Prove that Counts VII and VIII of Plaintiffs' Amended Complaint are Moot.

Hackensack tries to imply (without actually saying it) that it is in full compliance with N.J.A.C. 13:54-1.4(h) and thus Plaintiffs' motion (along with the Amended Complaint) is moot. However, although Hackensack claims that it has changed its procedures to allow the application for multiple Handgun Purchase Permits ("Permits") in one month, Hackensack fails to provide any evidence to prove that these procedures actually exist, although it could have easily provided documents to illustrate the existence of such procedures as an exhibit to the Certification of Joseph Zisa, Jr. Instead of providing the Court with a specific description of its

corrective procedures, Hackensack makes a general statement that it has changed its application process to "insure that applications for multiple permits are accepted." This is hardly a clear showing of new procedures sufficient to sustain Hackensack's burden in these motions.

Further, throughout the brief, Hackensack's argument only addresses the ability to apply for multiple permits in one month. Nowhere in Hackensack's brief does Hackensack address the issuance of more than one permit per month. This is especially suspect in light of Hackensack's citation to the Application for Multiple Handgun Purchase Exemption forms that are now online.[1] These forms are for applicants who qualify under the exemptions to New Jersey's One Gun Law and have nothing to do with all other applicants who are entitled pursuant to N.J.A.C. 13:54-1.4(h) to apply for and obtain multiple

[1] In its brief, Hackensack drops a footnote which refers to the availability of the Application for Multiple Handgun Purchase Exemption forms online.

permits at one time. Thus, Hackensack has left it entirely ambiguous in the record as to whether it intends to issue multiple permits only to those applicants who obtain one of the Exemptions or to every applicant as required by N.J.A.C. 13:54-1.4(h).

Further, Hackensack has refused to enter into any binding resolution of these claims, by way of consent order or otherwise.[2] This reluctance raises the question if the claims were truly moot, why would Hackensack refuse to proceed with a consent judgment and instead file a motion to dismiss?

Indeed, Hackensack could have followed the actions taken by Washington Township, another named defendant who changed its procedures after Plaintiffs filed suit. Washington Township acknowledged its correction through a Stipulation and Order. It is suspicious that Hackensack refuses to submit to a similar stipulation when, by its

[2] This stands in stark contrast to Washington Township, which entered into a Stipulation of Settlement which was "So Ordered" by the Court. (See DDE#31.)

own suggestion in its papers, it claims to have acquiesced to Plaintiffs' position.

Hackensack's oddly ambiguous statements cry out for a more in-depth look. Plaintiffs' motion for injunctive relief is not moot as to Hackensack and should be granted.

HACKENSACK'S MOTION TO DISMISS

A. Hackensack Relies on the State Defendants' Motion

Initially, in its motion to dismiss, Hackensack incorporates by reference the arguments of the State Defendants in their motion to dismiss. Accordingly, Plaintiffs incorporate the arguments asserted in Plaintiffs' Brief in Opposition to the State Defendants' Motion to Dismiss as well as Plaintiffs' brief in Reply to State Defendants' opposition to Plaintiffs' preliminary injunction motion. Plaintiffs supplement the arguments contained in the above-mentioned briefs with the arguments set forth below.

B. Counts VII and VIII are not Moot on the Substantive Claims

Hackensack asserts the same mootness argument in its motion to dismiss as in its untimely opposition to Plaintiffs' motion for injunctive relief. Accordingly, Plaintiffs incorporate their arguments set forth above herein in their entirety.

C. Plaintiffs' Amended Complaint Cannot Be Dismissed as to Hackensack Because Plaintiffs Have a Statutory Claim for Counsel Fees

Even if the Court concludes that the substantive claims in Counts VII and VIII of the Amended Complaint are moot, those counts also seek from Hackensack counsel fees and costs pursuant to 42 U.S.C. §1988 and N.J.S. 10:6-2(f), and therefore dismissal in not warranted. 42 U.S.C. §1988, the Civil Rights Attorney's Fees Awards Act of 1976, provides that in a federal civil rights action brought under §1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Similarly, the New Jersey counterpart of §1988, Section 10:6-2(f) of the New Jersey Civil Rights Act, provides: "In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs."

The United States Supreme Court has held that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" Hensley v. Eckerhart, 461 U.S. 424 citing S.Rep. No. 94-1011, p. 4 (1976).

Under applicable law and precedent, Plaintiffs should be deemed a statutory "prevailing party" because it was the filing of their Complaint that compelled Hackensack to allegedly comply with N.J.A.C. 13:54-1.4(h). It does not matter that Hackensack's concession is not a result of formal adjudication.

In Stanford Daily v. Zurcher, 64 F.R.D. 680, 684 (ND Cal. 1974), aff'd, 550 F.2d 464 (CA.9. 1977), rev'd on

other grounds, 436 U.S. 547 (1978), the plaintiffs obtained a declaratory judgment and moved for a preliminary injunction to prevent defendants from violating the judgment. Defendants promised not to violate the judgment and the court denied plaintiffs' motion. The District Court, however, awarded plaintiffs attorneys fees for time spent pursuing the preliminary injunction motion because the plaintiffs obtained "a significant concession from defendants as a result of their motion" and therefore "substantially advanced their clients' interests."

Moreover, the Court of Appeals for the Ninth Circuit has held that "final adjudication on the merits is not a prerequisite to recovery of attorney fees . . . if the totality of the litigation reveals that one party prevailed." All American Distributing Co., Inc. v. Miller Brewing Co., 736 F.2d 530, 531 (9th Cir. 1984). In All American Distributing, the court defined "prevailing party" as it was used in the Arizona Spiritious Liquor Franchises Act. Similar to 10:6-2(f), the Arizona statute

made no reference to adjudication on the merits being a prerequisite to recovering attorney fees, although, as the Ninth Circuit pointed out, "[t]he legislature easily could have so provided." Id. The Supreme Court has held similarly, stating "nothing in the language of §1988 conditions the District Court's power to award fees on full litigation on the issues or on a judicial determination that the plaintiff's rights have been violated." Maher v. Gagne, 448 U.S. 122, 129 (1980).

Although Hackensack now contends that it will no longer deprive Plaintiffs of their rights under N.J.A.C. 13:54-1.4(h), Hackensack did not take this position until it was forced to do so by the filing of Plaintiffs' Complaint. Moreover, the Certification of Vincent Furio confirms that Plaintiff Furio made more than one attempt to convince Hackensack to comply with the law prior to joining Hackensack in the within action, but Hackensack stubbornly refused to do so until it was served with the Amended Complaint.

In its brief, Hackensack claims that it is in the same position as Clinton and Rockaway Township in that it "took corrective action to permit applications for multiple permits." However, Hackensack ignores the critical distinction that these other townships took corrective action before Plaintiffs filed suit. Hackensack, on the other hand, continued to deny applications for multiple permits until after it was sued by Plaintiffs. Hackensack takes a particularly unreasonable position, suggesting, in essence, that it may violate clear and unambiguous law with impunity, force Plaintiffs to incur counsel fees to compel it to comply with the law, and then when sued it may suddenly reverse course without consequence. Such a position in untenable and is wholly inconsistent with the purpose and function of §1988 and §10:6-2(f).

Hackensack's position, that it need not pay counsel fees, if given credence by this Court, would mean that Plaintiffs could potentially have to sue each of the 566 municipalities in New Jersey to compel them to comply with

the law, and in each instance a municipality could simply change course the day it is served. Yet, the cost to Plaintiff would be massive and potentially prohibitive. This is precisely what these fee shifting statutes are designed to prevent.

In this instance, Plaintiffs respectfully submit that the Court should give effect to the counsel fee provisions of §1988 and §10:6-2(f). The very essence of these provisions "is to ensure 'effective access to the judicial process' for persons with civil rights grievances." Hensley, 461 U.S. 424 citing H.R. Rep. No. 94-1558, p. 1 (1976). Denying counsel fees would diminish the effect of §1983 and The New Jersey Civil Rights Act because it would permit violators such as Hackensack to ignore the law and correct its action only after being sued, all at the expense of plaintiffs who dare to file suit.

For the foregoing reasons, Hackensack's motion to dismiss should be denied.

Respectfully submitted,

/s/ Daniel L. Schmutter

Daniel L. Schmutter
DLS:amh

cc: Larry Etzweiler, Esq. (Via ECF)
Joseph C. Zisa, Esq. (Via ECF)
Michael Gilmore, Esq. (Via Fax and Regular Mail)